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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re J.C., a Person Coming Under the  
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

J.C.,

Defendant and Appellant.

B252637

(Los Angeles County  
Super. Ct. No. PJ49676)

APPEAL from a judgment and order of the Superior Court of Los Angeles County, Morton Rochman, Judge. Reversed in part, affirmed in part, and remanded with directions.

Courtney M. Selan, under appointment by the Court of Appeal, for Minor and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, William H. Shin and Stephanie C. Santoro, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant J.C., a minor, appeals from a judgment sustaining the charges in a juvenile wardship petition of attempted robbery (count 1) and assault (counts 2 & 3). (Welf. & Inst. Code, §§ 602; 731, subd. (c).) He contends that because the assault charges are duplicative, one must be reversed. He further argues that in calculating his maximum term of confinement, the trial court must consider the effect of Penal Code section 654,<sup>1</sup> which precludes separate punishments for an assault that was incidental to an attempted robbery.

We agree with both contentions. We reverse the true finding on count 2 (assault by means likely to produce great bodily injury), affirm the true findings on counts 1 (attempted robbery) and 3 (assault with a deadly weapon), and remand to allow the trial court to recalculate the maximum term of confinement. In doing so, the trial court is instructed to determine whether the assault and attempted robbery arose from a single indivisible course of conduct or from separate and independent criminal objectives.

### **BACKGROUND**

In the present wardship petition,<sup>2</sup> appellant was charged with: (1) attempted second degree robbery (§ 211; count 1); (2) assault by means likely to produce great bodily injury (§ 245, subd. (a)(4); count 2); and (3) assault with a deadly weapon (§ 245,

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<sup>1</sup> Unless otherwise indicated, all further undesignated statutory references are to the Penal Code.

<sup>2</sup> This is the third wardship petition in this case. In the first petition, appellant admitted the allegation of second degree robbery, which the court found true and sustained in November 2012. The court ordered a maximum term of confinement of five years.

In the second petition, appellant admitted the allegation of grand theft of personal property, which the court found true and sustained in March 2013. He was ordered detained in juvenile hall.

subd. (a)(1); count 3).<sup>3</sup> Each count contained an enhancement for the personal infliction of great bodily injury on Kristian C. (§ 12022.7, subd. (a).)

Following is a summary of Kristian's testimony at the adjudication hearing. He was skateboarding at a park with his friend Danny when a group of males began harassing another skater. One of them came up to Kristian, asked for money, and tried to search his pockets. After Kristian slapped the person's hand away, he was surrounded and beaten by several people. He fell to the ground bleeding. Someone else used a metal chain to whip him on the head, face, shoulders, and back. The assailants issued a gang threat, stating, "This is BPS hood. Don't come back here." After Danny was beaten, kicked, and stomped, the assailants threw back a skateboard and left without taking anything from Kristian or Danny. Kristian was treated at the hospital for several fractures of his jaw, which had to be wired shut. The whipping had lacerated his scalp, which required sutures and staples, and left scars on his face, shoulders, and back.

About a week after the attack, Detective Paul Shearholdt of the Los Angeles Police Department asked Kristian if he could identify any photograph of a suspect in a school yearbook. Kristian found appellant's photograph in the yearbook and identified him as the person who had whipped him with the chain. During appellant's arrest, the police confiscated a metal chain.

At the contested adjudication hearing, neither Kristian nor Danny made an in-court identification of appellant. However, a police officer (Joshua Diaz) testified that earlier that morning, Kristian had looked at appellant's booking photograph and identified him as the person who had hit him with the chain.

At the conclusion of the hearing, the trial court (Commissioner Benjamin Campos)<sup>4</sup> attributed Kristian's failure to make an in-court identification of appellant to

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<sup>3</sup> In counts 4 and 5, appellant was charged with assaulting Danny B. (§ 245, subd. (a)(4); count 4) and resisting a peace officer (§ 148, subd. (a)(1); count 5). At the end of the adjudication hearing, the juvenile court dismissed counts 4 and 5 for insufficient evidence. Accordingly, only counts 1 through 3 are at issue on appeal.

his fear of appellant's gang. The court found the charges and enhancement allegations in counts 1 through 3 (attempted robbery and assault of Kristian) to be true and sustained the petition as to those counts. The court dismissed counts 4 (assault on Danny) and 5 (resisting a peace officer) for lack of substantial evidence.

At the disposition hearing, a new set of attorneys<sup>5</sup> appeared before a different bench officer (Judge Morton Rochman). The court accepted the prosecutor's representation that as a result of the present adjudication, the maximum term of confinement had increased by seven years, from the original maximum term of five years and four months,<sup>6</sup> to the current maximum term of 12 years and four months. The court ordered that appellant be placed in a long-term camp program for nine months. Appellant timely appealed from the judgment.

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<sup>4</sup> The parties had stipulated to allow the commissioner to hear the matter as a temporary judge.

<sup>5</sup> The People were represented by Mr. Ritter at the adjudication hearing, and by Ms. Carnack at the disposition hearing.

Appellant was represented by Mr. Villa at the adjudication hearing, and by Mr. Kallen at the disposition hearing. The record indicates that the court appointed private attorneys Villa and Kallen to represent appellant because the public defender had declared a conflict of interest.

<sup>6</sup>We express no opinion as to the length of the original maximum term of confinement, because that issue is not before us.

Although the record is not entirely clear, it appears that the prosecutor computed the seven-year increase in the maximum term as follows: (1) a five-year term for count 1, attempted second degree robbery, consisting of the mid-term of two years (§§ 213, subd. (b); 1170, subd. (h)(1)), plus a consecutive three years for the enhancement for personal infliction of great bodily injury (§ 12022.7, subd. (h)); (2) a consecutive one-year term for count 2, assault by means likely to produce great bodily injury, consisting of 1/3 the mid-term of three years (§ 245, subd. (a)(4)); and (3) a consecutive one-year term for count 3, assault with a deadly weapon, a chain, consisting of 1/3 the mid-term of three years (§ 245, subd. (a)(1)).

## DISCUSSION

Appellant raises two issues on appeal. First, he contends the true findings on the two assault charges (counts 2 and 3) are duplicative, and one must be reversed. He cites *In re Mosley* (1970) 1 Cal.3d 913, 919, fn. 5, for the proposition that the crimes of assault by means of force likely to produce great bodily injury (§ 245; subd. (a)(4), count 2) and assault with a deadly weapon (§ 245, subd. (a)(1); count 3) are a single offense. Respondent concedes that issue. The parties also agree that one of the assault charges must be reversed, and that it makes no difference which one it is. Based on *Mosley*, we conclude the parties are correct on this point. We therefore reverse the true finding on count 2, assault by means of force likely to produce great bodily injury.

Next, appellant contends that when his maximum term of confinement<sup>7</sup> is calculated on remand, the trial court must consider for purposes of section 654<sup>8</sup> whether he had a single objective or multiple objectives during the incident. Section 654 “prohibits punishment for two crimes arising from a single indivisible course of conduct. [Citation.] If all of the crimes were merely incidental to, or were the means of accomplishing or facilitating one objective, a defendant may be punished only once. [Citation.] If, however, a defendant had several independent criminal objectives, he may

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<sup>7</sup> The maximum confinement period is explained in Welfare and Institutions Code section 731, subdivision (c) as follows: “A ward committed to the Division of Juvenile Facilities may not be held in physical confinement for a period of time in excess of the maximum period of imprisonment that could be imposed upon an adult convicted of the offense or offenses that brought or continued the minor under the jurisdiction of the juvenile court. A ward committed to the Division of Juvenile Facilities also may not be held in physical confinement for a period of time in excess of the maximum term of physical confinement set by the court based upon the facts and circumstances of the matter or matters that brought or continued the ward under the jurisdiction of the juvenile court, which may not exceed the maximum period of adult confinement as determined pursuant to this section. . . .”

<sup>8</sup> Section 654, subdivision (a) provides: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.”

be punished for each crime committed in pursuit of each objective, even though the crimes shared common acts or were parts of an otherwise indivisible course of conduct. [Citation.] The defendant’s intent and objective are factual questions for the trial court, and we will uphold its ruling on these matters if it is supported by substantial evidence. [Citation.]’ (*People v. Perry* (2007) 154 Cal.App.4th 1521, 1525 . . . )” (*People v. Bui* (2011) 192 Cal.App.4th 1002, 1015 (*Bui*).)<sup>9</sup>

Respondent argues that the section 654 issue already has been decided in favor of multiple punishments. Respondent would have us apply the general rule that where a trial court imposes sentence on two crimes without imposing a stay under section 654, the finding that the crimes were divisible and thus subject to multiple punishments is implicit in the judgment and must be upheld if supported by substantial evidence on appeal. (*People v. Lopez* (2011) 198 Cal.App.4th 698, 717; *People v. Tarris* (2009) 180 Cal.App.4th 612, 626–627.) We are not persuaded, however, that the inference applies under the facts of this case.

In this case, the judge who sustained the petition (Commissioner Campos) was not the same judge who calculated the maximum term of confinement (Judge Rochman). Significantly, the record contains no indication that Judge Rochman was aware of the evidence in this case. He did not mention the evidence that Kristian had been beaten by several persons, which resulted in a broken jaw, before being whipped with a metal chain that lacerated his scalp and left several scars on his head, face, shoulders, and back. If the record had indicated that Judge Rochman was aware of this evidence, we would infer that by calculating the maximum term of confinement without imposing a stay under section 654, he found the crimes to be divisible and subject to multiple punishments.

However, the record fails to demonstrate that Judge Rochman was sufficiently familiar with the evidence to exercise judicial discretion under section 654. “To exercise

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<sup>9</sup> The fact that no objection was raised below on section 654 grounds does not alter this result. The failure to raise a section 654 objection in the trial court is not a waiver or forfeiture, because a trial court acts in excess of its jurisdiction and imposes an unauthorized sentence when it erroneously stays or fails to stay execution of a sentence under section 654. (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17.)

the power of judicial discretion all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent and just decision. On that basis it gives latitude to the trial judge to express his own convictions in the declaration of rights and application of remedies. (*Gossman v. Gossman* [1942] 52 Cal.App.2d 184, 194.)” (*People v. Surplice* (1962) 203 Cal.App.2d 784, 791.) As stated in *Gossman, supra*, 52 Cal.App.2d at p. 194, “Even within its legal limits the power [of judicial discretion] is not unbridled. The mere fact that a court may have jurisdiction to make an order does not equip it to exercise *judicial discretion*. Its acts must not only be confined within the field of *discretion* but must also be of a character within the bounds of the limiting adjective ‘judicial.’ To exercise that power all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent, and just decision. On that basis then, and guided thereby, it gives latitude to the trial judge to express his own convictions in the declaration of rights and application of remedies.”

*Bui, supra*, 192 Cal.App.4th at p. 1016 is instructive. In that case, the appellate court remanded the matter for the trial court to consider the material evidence before making a discretionary finding under section 654: “Here, the evidence showed that defendant continued to shoot [the victim] after he fell to the floor, face down, unable to move. In the circumstances, defendant’s intent and objectives are factual questions for the trial court. (*Perry, supra*, 154 Cal.App.4th at p. 1525.) We therefore remand the matter to the trial court to determine whether the shooting was incidental to the robbery for purposes of section 654 and, if not, whether to impose a consecutive or concurrent sentence for count three. (See *People v. Jones* (2007) 157 Cal.App.4th 1373, 1383 [remand for resentencing appropriate where court was mistaken as to scope of discretionary powers]; *People v. Jackson* (2005) 134 Cal.App.4th 929, 936, [sentencing decision made by court that is mistaken regarding its discretion generally results in remand for proper exercise of discretion].)” (*Bui*, at p. 1016.)

In accordance with the *Bui* decision, this matter is remanded to allow the trial court to review the evidence and determine whether the whipping was administered after

Kristian had been rendered helpless by blows that had fractured his jaw in several places, and if so, whether the whipping was an act of gratuitous violence against a helpless victim and thus not incidental to the attempted robbery for purposes of section 654. (See *People v. Nguyen* (1988) 204 Cal.App.3d 181, 190 [an act of gratuitous violence against a helpless and unresisting victim has traditionally been viewed as not incidental to robbery for purposes of section 654]; see also *People v. Cleveland* (2001) 87 Cal.App.4th 263, 271–272 [sufficient evidence that defendant harbored divisible intents in committing robbery and attempted murder when he repeatedly hit feeble, unresisting victim with two-by-four, using far more force than necessary to achieve one objective].) Based on its determination under section 654, the court shall then recalculate the appropriate maximum period of confinement.

### **DISPOSITION**

We reverse the true finding on count 2 (assault by means likely to produce great bodily injury), affirm the true findings on counts 1 (attempted robbery) and 3 (assault with a deadly weapon), and remand to allow the trial court to recalculate the maximum term of confinement. In doing so, the trial court is instructed to determine for purposes of section 654 whether the assault and attempted robbery arose from a single indivisible course of conduct or from separate and independent criminal objectives.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

EDMON, J.\*

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\*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.